

In re ) Fair Hearing No. 15,477  
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Appeal of )

The petitioner appeals a decision of the Department of Social and Rehabilitation Services (SRS) denying his application for a foster care license based on his past criminal convictions. The issue is whether the decision of the Commissioner is arbitrary and capricious or not in accord with the law.

1. The petitioner and his wife applied for a foster care license in March of 1998. The petitioner reported that he had a criminal record in the distant past but claimed that he had since rehabilitated himself and offered several letters in his support. On April 20, 1998, the residential care licensing unit of SRS mailed the petitioner a notice denying his application because of his "lengthy record of convictions of criminal offenses."

2. The petitioner's criminal record shows that he was convicted of a misdemeanor (driving a vehicle without the owner's consent), and two felonies (breaking and entering in the daytime and nighttime) arising from the same incident in 1967 when he was sixteen years old. He was committed to a juvenile treatment center and was further convicted on May

19, 1969 of escaping from that facility. He served eighty days for that offense and was released. In late 1969, when he was eighteen, the petitioner killed his father and his father's girlfriend. As a result of their deaths, their infant was left without caretakers and died from exposure. In July of 1970, the petitioner was convicted of second degree murder for which he received a life sentence. He was further convicted in 1971, 1972 and 1973 for escapes from prison.

3. The petitioner's parole officer described him in a letter to SRS as having been an abused child who started on a crime spree as a teenager. He was an uncooperative prisoner during his incarcerations and his escapes led to his transfer to a federal facility in Illinois reserved for the worst offenders. However, while he was in Illinois he had a "turn-around" and was able to return to Vermont. His parole officer decided because of his apparent new found honesty to try him on weekend furloughs in 1984. He proved to be trustworthy and was moved to full furlough status in 1985. He was paroled in October of 1985, after some eighteen years in prison. His parole took place under intensive supervision and was violated on one occasion involving the drinking of some beer in September of 1986. He was re-paroled in October of 1986 after he showed up in a timely manner for his parole hearing and the "no drinking" condition was struck as being irrelevant to his offenses.

He has since been on minimal supervision and has been highly praised by every officer who has supervised him in that time. He remains in parole status.

4. Since the petitioner was paroled he has been employed, got married and divorced and has remarried again. His only encounters with the law in the last twelve years have been two traffic violations. He now works for the State of Vermont. In his first marriage he was the stepfather to four young children until his wife separated from him. He has continued to have a relationship with some of these children as they have grown into adulthood. He has known his current wife for five years. They had a child in 1995 who was discovered at the age of four months to have a rare blood disease which was destroying her organs. The petitioner quit his job when this happened and stayed with her at the hospital for the better part of fourteen months until she died in 1996.

5. Because the petitioner and his wife fear that another natural child of theirs might have the same disease that took their daughter and because they love children, they have decided to apply to become foster parents. They are also interested in potentially adopting a child. The petitioner believes that his own early experiences as an abused child and a teenage criminal offender give him a special perspective which would help him particularly to help troubled children. The petitioner struck the hearing

officer as a composed and sincere individual.

6. In support of his application the petitioner presented both the oral and written testimony of sixteen people who have known him well over the last few years. The attestant included his own siblings, his wife's family members, friends, the pastors of churches he has belonged to, and several social workers and health professionals (doctors and nurses) at the Children's Hospital at Dartmouth where his daughter was treated. These attestants were remarkably consistent and presented a picture of a man who in the last five years or so has become a part of a very close and deeply religious family. As part of that family, the petitioner cared for his wife's elderly grandparents with patience and compassion until their deaths enabling his wife and her sister to continue to work to support them. He has won the respect and admiration of his siblings and the affection of their children. He is highly-thought of by those he works with in his church group where he is involved in youth activities. His pastor attested that his observation of the petitioner is of a calm man who is always in control of himself. The social workers and health care professionals who got to know the petitioner during his fourteen months at the hospital with his daughter spoke movingly of his compassion for and devotion to her, including his patience, steadfastness and sense of humor in the face of his child's tremendous pain. The universal

opinion of these attestants is that the petitioner and his wife would make outstanding parents for any child.

7. The petitioner had an opportunity to put the above information before the Commissioner and he did so. On June 29, 1998, the Commissioner of SRS sent a letter to the petitioner and his wife which provided in pertinent part as follows:

I have reviewed your request to have my department reconsider your application for foster care licensure.

The letters of support which you have submitted have been reviewed and certainly suggest that you have made good progress in recent years. [Petitioner's] letter speaks of the tremendous obstacles he has faced in his life and his considerable efforts to overcome them. Despite this, I am unable to support your application.

[Petitioner's] extensive criminal history is extremely troubling. I must take his criminal background very seriously. They include convictions for escape (4), breaking and entering in the daytime, breaking and entering in the nighttime, grand larceny and murder in the second degree.

As indicated in [the licensing division's] letter mailed to you on April 20th, licensing regulations include the following:

038.1 "[A license may be denied or revoked if the applicant, license or other member of the household:] has been charged or convicted of a criminal offense;"

Additionally, it is my intent to fully comply with the new Federal law which precludes me from issuing you a license. Specifically, Title 42 of the U.S. Code section 671 (20) A) clearly mandates that foster parent applicants with certain felony convictions, including homicide, shall not be granted a license.

8. Further testimony was put on by a representative of the Commissioner at the hearing that these regulations and laws were put in place to prevent persons known to have

reacted badly in difficult situations from taking on the challenging and stressful job of foster care. It is the Commissioner's opinion that it is inappropriate for the Department to take a chance and place a child in its care with a person who had committed a homicide. In fact, even before the Federal law which the Department feels prohibits granting a license in this case, the Commissioner had a policy of never waiving the regulation for crimes involving physical violence, even upon evidence of recent rehabilitation because of the great risk to safety.

9. It is the petitioner's contention that the new law is unfair and "unconstitutional" and does not protect children. He asks for individual consideration of each case with regard to the ability to care for children. He believes his experience with his dying child shows that he can handle stressful situations with grace and effectiveness.

ORDER

The decision of the Department is affirmed.

REASONS

The Commissioner of the Department of Social and Rehabilitation Services is charged by the legislature with the administration of the foster care program. See, generally, 33 V.S.A. § 304(b)(2), and 3501. The statutes

specifically give the Commissioner the duty and authority to:

. . .

issue regulations governing application for, and issuance, revocation, term and renewal of licenses and registration. In the regulations he may prescribe standards and conditions to be met, records to be kept and reports to be filed.

33 V.S.A. § 306 (1)

Pursuant to this authority, the Department has adopted the following pertinent regulations:

038        A license may be denied or revoked if the applicant, licensee or other member of the household:

038.1        Has been charged with or convicted of a criminal offense;

It is undisputed that the petitioner was convicted of several criminal offenses in the past, including second degree murder. Once the Department has established the violation of a regulation, the decision to revoke the license for violation of that regulation will be upheld if the Department had some reasonable basis for taking its action. See, e.g., Fair Hearings No. 12,790, 13,092. The Department's decision will only be overturned if the petitioner can show that the revocation was an abuse of the Department's discretion.

There is no question in this matter that the Department considered and reviewed all the pertinent facts and circumstances regarding the petitioner's situation. The use

of the words "may" in the regulation regarding denials, appears to give the Commissioner the discretion to grant a license in spite of a history of criminal offenses if he deems it appropriate. The Commissioner has said that he does not feel it is appropriate to waive the violation in light of the seriousness of the murder conviction, even though it occurred almost thirty years ago and even though substantial evidence exists that the petitioner has changed considerably since then.

Although the evidence in this matter indicates that it is quite likely that the petitioner would not pose any physical threat to children now and that he might, indeed, be an outstanding parent, it cannot be said that the Commissioner's decision is unreasonable or arbitrary, in light of the extremely serious nature of the crime the petitioner committed. Unless the petitioner can demonstrate that there is no rational ground upon which to rest this decision, the Board is bound to uphold that decision even if it might have reached a different decision. 3 V.S.A. § 3091(d), Fair Hearing Rule 17. It cannot be found in this matter that the Commissioner acted without reason and it must also be concluded that this felony involving physical violence is sufficient ground for the Commissioner to conclude that he has sufficient "cause" under 33 V.S.A. § 306(b)(3) to deny the foster care license. See Fair Hearing No. 12,413.



In addition, a new federal law enacted on March 20, 1998, requires states that wish to receive federal foster care payments to submit plans which

. . . provides procedures for criminal records checks for any prospective foster or adoptive parent before the foster or adoptive parent may be finally approved for placement of a child on whose behalf foster care maintenance payments or adoption assistance payments are to be made under the State plan under this part, including procedures requiring that--

(i) in any case in which a record check reveals a felony conviction for child abuse or neglect, for spousal abuse, for a crime against children (including child pornography), or for a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery, if a State finds that a court of competent jurisdiction has determined that the felony was committed at any time, such final approval shall not be granted; and

(ii) in any case in which a record check reveals a felony conviction for physical assault, battery, or a drug-related offense, if a State finds that a court of competent jurisdiction has determined that the felony was committed within the past 5 years, such final approval shall not be granted;

. . .

(Emphasis supplied)

42 U.S.C. § 671 (20) (A)

Under this regulation, the Vermont Department of Social and Rehabilitation Services cannot receive federal funding for the costs of foster care if it approves applications for persons who have been convicted of homicide at any time in

the past.<sup>1</sup> Such a regulation provides the Commissioner with a second ground for denying this application--the potential loss of all federal funds for foster care, giving even more weight to the Commissioner's decision to deny this application. Although the petitioner claims this law is "unconstitutional", he sets forth no grounds upon which such a determination could be made.

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<sup>1</sup> This statute's refusal to limit a "look-back" period to five years for the more serious crimes, further supports the Commissioner's review that remoteness in time is not a sufficient basis to overlook a crime involving serious physical harm.